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IN THE

Supreme Court of the United States

October Term, 1971

70-121

No. ~~1570~~

RUFUS LEE, JR.,

Petitioner,

vs.

COUNTY COURT OF THE COUNTY OF ERIE, HON. ERNEST L. COLUCCI, Individually and as a Judge thereof, and MICHAEL F. DILLON, District Attorney of Erie County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK, COURT OF APPEALS

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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COUNTY COURT OF THE COUNTY OF ERIE, HON. ERNEST L. COLUCCI, Individually and as a Judge thereof, and MICHAEL F. DILLON, District Attorney of Erie County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK, COURT OF APPEALS

Rufus Lee, Jr. prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered on the 14th day of January, 1971.

Opinion Below

The majority and dissenting opinions of the New York Court of Appeals are reported at ____ N. Y. 2d ____ and are reprinted at pages 18-37, *infra* of the Appendix hereto. The Opinion of the Appellate Division of the Supreme Court, Fourth Judicial Department is reported at 33 A. D.

2d 1093 and is reprinted at pages 37-39, *infra* of the Appendix hereto. The Opinion of the County Court of Erie County (Hon. Ernest L. Colucci) is not officially reported and appears in the Appendix at pages 39-42.

Jurisdiction

The judgment of the New York Court of Appeals was entered on January 14th, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3). This judgment finally disposed of the Writ of Prohibition and is a final judgment reviewable in the United States Supreme Court under 28 U. S. C. Section 1257. *Camara v. Municipal Court*, 387 U. S. 523, 87 S. Ct. 1727 (1967). See also, *Madruga v. Superior Court*, 346 U. S. 556, 74 S. Ct. 298 (1954).

Questions Presented

I. Whether an accused in a state criminal proceeding who casts the burden of proving his sanity beyond a reasonable doubt upon the prosecution by virtue of a statutorily authorized plea of not guilty by reason of insanity waives his right to invoke the privilege against self-incrimination at a judicially ordered, pretrial psychiatric interrogation, the results of which may be utilized by the prosecution on the trial to sustain its burden of proof on the issue of sanity.

II. Whether an accused in a state criminal proceeding who has been judicially ordered to submit to a pretrial, psychiatric interrogation is entitled to the presence and active participation of counsel at such examination.

Statutory Provision Involved

The statutory provision involved is Section 658 of the New York Code of Criminal Procedure (C. C. P. § 658); reprinted at page 16 *infra* of the Appendix hereto.

Statement of the Case

The petitioner was indicted for the murder of two (2) women which occurred on November 5th, 1964, two (2) days following his release from a mental institution. The petitioner was found competent to stand trial following a psychiatric examination ordered by a County Court Judge pursuant to C. C. P. § 658. The petitioner pleaded not guilty by reason of insanity pursuant to the provisions of Section 336 of the Code of Criminal Procedure.

At the trial, the Court-appointed examining psychiatrist testified in behalf of the petitioner on the issue of his sanity. Following a jury trial, at which petitioner relied on the defense of insanity, he was found guilty of murder in the first degree on December 17th, 1965.

On February 22nd, 1968 the Appellate Division of the Supreme Court, Fourth Judicial Department, unanimously reversed the judgment of conviction and granted a new trial on the grounds that the prosecution had failed to prove the petitioner's sanity beyond a reasonable doubt and that the verdict was against the weight of the evidence. *People v. Lee*, 29 A. D. 2d 837 (1968).

Since the reversal of petitioner's conviction as aforesaid, the prosecution has twice sought and twice secured Orders for a pre-second trial psychiatric examination pursuant to C. C. P. § 658 to determine his sanity at the time of the alleged crime. In each instance, the petitioner refused to answer questions relating to events at the time of

the alleged murders. However, petitioner offered to answer questions relating to his general background and then current circumstances and additionally offered to allow the examining psychiatrists an opportunity to examine his extensive medical and hospital records as well as the transcript of the medical testimony adduced at the first trial.

The prosecution petitioned the respondent County Court of the County of Erie (Hon. Ernest L. Colucci) for an Order striking the defense of insanity. The County Court granted the Order thus virtually insuring the inevitably of a conviction upon the second trial.

The petitioner sought a review of the County Court's Order striking his defense by instituting a special proceeding in the Appellate Division of the Supreme Court, Fourth Judicial Department, under Article 78 of the New York Civil Practice Law and Rules and requested that the County Court be prohibited from proceeding to try the petitioner until his insanity defense was reinstated. The Appellate Division agreed and reinstated the petitioner's plea of not guilty by reason of insanity but further ordered that he be compelled to submit to a psychiatric examination to be conducted in the absence of all non-medical personnel including petitioner's counsel (App. page 38).

The respondents appealed to the New York Court of Appeals. Petitioner cross-appealed and sought review of that part of the Appellate Division's Order which directed that he submit to another psychiatric examination to be held in the absence of his counsel. Petitioner contended that: (1) although the Appellate Division properly reinstated petitioner's plea of not guilty by reason of insanity, it erred by ordering the petitioner to submit to a psychiat-

ric examination because such would be violative of his constitutional privilege against self-incrimination and, (2) the Appellate Division's Order excluding petitioner's counsel from attendance at the psychiatric examination deprived him of his constitutional right to counsel.

On January 14th, 1971, the New York Court of Appeals rendered its decision and held that: (1) the petitioner waived his privilege against self-incrimination by interposing a plea of not guilty by reason of insanity, and (2) if petitioner refused to submit to a psychiatric examination as ordered, he would be barred from offering psychiatric evidence and unless other proof relevant to his defense of insanity was offered, the People could rely upon the presumption of sanity to sustain their burden of proof, and (3) if other proof of insanity is introduced on the trial, the Court may instruct the jury that it may consider the petitioner's failure to cooperate in determining the merits of the defense, and (4) petitioner had a right to the presence of counsel at the psychiatric examination but that counsel could not take an active role and had to attend as a mere observer.

Reasons for Granting the Writ

I.

This case raises important questions concerning judicially imposed limitations upon the exercise of an accused's privilege against self-incrimination at a pretrial, judicially ordered psychiatric examination following the entry of a plea of not guilty by reason of insanity.

The assertion of the constitutional privilege against self-incrimination has been limited to evidence of a testimonial character. *Schmerber v. California*, 384 U. S. 757, 86 S. Ct.

1826 (1966). And while non-testimonial evidence cannot lay claim to constitutional protection, the *Schmerber* case makes it crystal clear that ". . . . protection of the privilege reaches an accused's communications, *whatever form they might take.*" *Id.* at 764 (Emphasis supplied).

It follows that if statements attempted to be elicited from the petitioner during the course of a compulsory mental examination conducted pursuant to C. C. P. § 658 are considered protected "communications," there is a constitutional right to invoke the privilege against self-incrimination by refusing to answer questions which are deemed to be likely to produce communications of an incriminatory nature. Petitioner respectfully insists that by any definition the statements sought in the past and therefore those likely to be sought in the future by Court-appointed examining psychiatrists are not only communications but communications of a highly incriminatory character.[1]

While statutes in more than thirty (30) jurisdictions which authorize pretrial psychiatric examinations of an accused have survived constitutional attack, in all these cases the accused had cooperated in the examination and never raised the issue presented in this petition. *See* Danforth, *Death Knell for Pretrial Mental Examination? Privilege Against Self-Incrimination*, Rutgers L. Rev. 489, 490 and authorities cited therein.

The statements which the examining psychiatrists are likely to attempt to elicit from the petitioner are *incrimi-*

[1] The Record on Appeal in the New York Court of Appeals refers to some of the questions which petitioner refused to answer. For example, petitioner was asked by the examining psychiatrists whether he was familiar with the names of the two (2) victims of the alleged crime. He was further asked how it happened that he was charged with murder in the first degree and what happened on the day of the alleged crime. See pages 41 through 44 of the Record on Appeal in the New York Court of Appeals.

natory in at least two (2) respects: first, since the defense of insanity has been interposed, the prosecution will have the trial burden of proving the petitioner's sanity "beyond a reasonable doubt." *People v. Lee*, 29 A. D. 2d 837 (1968). Consequently, although statements elicited from the petitioner by the examining psychiatrists may not be useable in the prosecution's case in chief, they may be utilized to form the basis for expert medical opinions on the issue of sanity and thus provide the prosecution with the foundation for proving an element of the crime with respect to which they have the burden. Since the petitioner would be the testimonial communicative source of such proof, an effective infringement upon his privilege against self-incrimination would occur. The fact that the use made of petitioner's statements may be indirect in nature does not purify evidence which is otherwise constitutionally contaminated.

Secondly, although Section 662 of the New York Code of Criminal Procedure prohibits the introduction into evidence of a psychiatric report made pursuant to an examination under provisions of C. C. P. § 658, evidence in the nature of an expert, psychiatric opinion based upon statements secured from the lips of the petitioner would not be so proscribed. *People v. Butchino*, 13 A. D. 2d 183 (1961). Moreover, any attempt to conduct an effective cross examination of the expert medical witness would almost certainly have to include an inquiry as to the source of the information which formed the underlying basis for the witness' opinion. See *People v. Butchino, supra; People v. Faber*, 199 N. Y. 256 (1910). Thus, although such facts may come into the case for the announced purpose of contesting the petitioner's claim of insanity, in the absence of a bifurcated trial procedure such as that which is suggested in the dissenting opinion of Judge

Breitel (Appendix page 35), it is naive and unrealistic to believe that a jury will be able to effectively segregate the evidence ". . . into separate intellectual boxes . . ." see *Bruton v. United States*, 391 U. S. 123, 131, 88 S. Ct. 1620, 1625 (1968).

There is then a substantial danger that the jury will use a communication extracted from the unwilling lips of the petitioner to determine whether he committed the *actus reus*. See *Jackson v. Denno*, 378 U. S. 368, 84 S. Ct. 1774 (1964).

From the foregoing it may be concluded that the statements sought to be elicited from the petitioner would be incriminatory in nature in view of their testimonial character would be within the scope of the constitutional privilege against self-incrimination.

II.

The Court should consider whether an accused has a constitutional right, independent of state statute, to raise the issue of lack of criminal responsibility because of mental incapacity.

The defense of not guilty by reason of insanity has historical antecedents in the English common law traceable to the year 1278. Calendar of Close Rolls, Edward I, 7 EPW. 1 (1278) page 518; see Michael and Wexler, Criminal Law and Its Administration, p. 807 ff. In *State v. Strasberg*, 60 Wash. 106, 110 Pacific 1020 (1910), the Supreme Court of the State of Washington held that the legislature's attempt to legislate away the defense of insanity was unconstitutional. The *Strasberg* Court reasoned that since the defense existed at common law and the state constitution having adopted the common law as it existed on the date of adoption, the right to a trial by

jury means that an accused has the right to a determination of every fact in question relating to the determination of guilt or innocence. The Court reasoned that since the right to demonstrate insanity is inherently related to the issue of guilt or innocence, it could not be abolished by legislation without accomplishing a violation of an accused's right to due process of law.

In 1928 the legislature of the State of Mississippi attempted to enact legislation which would have abrogated the defense of insanity in murder cases. The Supreme Court of Mississippi promply declared the statute to be:

> ". . . uncontitutional and void because in controvention of its section 14, Constitution 1890, which ordered that 'no person shall be deprived of life, liberty or property except by due process of law.'" *Sinclair v. State*, 161 Miss. 142, 132 S. 581. See also 4 Blackstone's Commentaries 24.

Thus, although the issue of whether the defense of insanity has constitutional dimensions has not been frequently litigated, ". . . what authority exists indicates that it is guaranteed . . ." Compulsory Mental Examinations and the Privilege Against Self-Incrimination, 1964 Wis. L. Rev. 671, 680. See also, *Thomas v. Cunningham*, 313 F. 2d 934 (4th Cir. 1963); *State v. White*, 60 Wash. 2d 551, 374 P. 2d 941 (1962). In its opinion in the instant case, the New York Court of Appeals ostensibly accepts the propositions that (1) an accused is possessed of the privilege against self-incrimination at a pretrial psychiatric examination, and (2) that an accused has at least a statutory right to plead not guilty by reason of insanity. However when an accused elects to exercise one of these rights, he forefeits the other. Since there is no waiver in fact the Court presumably relies upon the theory of constructive waiver.

Petitioner respectfully submits that the doctrine of constructive waiver of constitutional rights not only never has been judicially recognized but indeed has been expressly rejected by this Court in *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966). In *Miranda*, this Court made clear that inaction by an accused cannot result in the finding of a valid waiver of fundamental constitutional right. Not only must the waiver be expressed by the accused, but the record must clearly reflect that it was validly, intelligently and understandably made. *Id.* 384 U. S. at 473, 86 S. Ct. at 1628. See also *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019 (1938).

If the doctrine of constructive waiver is to insinuate itself in this case at all, it would necessarily relate not to the constructive waiver of petitioner's constitutional privilege against self-incrimination, but rather to his right—constitutional or statutory—to assert the defense of not guilty by reason of insanity. It is at this point that the argument has come full circle since the only basis for holding that an accused has waived his right to present psychiatric evidence in support of his defense would be the refusal to furnish certain information to examining psychiatrists on the ground that to do so would violate his privilege against self-incrimination.

Moreover, this Court has consistently refused to sanction the judicial exaction of a heavy price for the exercise of a constitutional right. In *Malloy v. Hogan*, 378 U. S. 1, 84 S. Ct. 1489 (1964), this Court said:

> "The Fourteenth Amendment secures against a state invasion, the same privilege that the Fifth Amendment guarantees against Federal infringement—the right of a person to remain silent unless he chooses to speak by the unfettered exercise of his own will and to suffer no penalty for such silence." *Id.* 378 U. S. at 8, 84 S. Ct. at 1493.

In *Spevack v. Klein*, 385 U. S. 911, 87 S. Ct. 625 (1967), this Court stated unequivocally (referring to the language of *Malloy v. Hogan* cited above) that:

> "... 'penalty' is not restricted to a fine or imprisonment. It means as we said in *Griffin v. California*, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, the imposition of any sanction which makes assertion of the Fifth Amendment's privilege 'costly.'" *Id.* 380 U. S. at 614, 89 S. Ct. at 1233.

Surely if a person's privilege to practice law cannot be conditioned upon the relinquishment of his right against self-incrimination, it can scarcely be proposed that a person accused of the crime of murder can have his right to assert the defense of legal insanity qualified by the relinquishment of his right against self-incrimination.

Accordingly, the petitioner's assertion of his Fifth Amendment privilege against self-incrimination cannot be made costly by causing the forfeiture of his right—whether of constitutional or statutory origin—to advance a defense of not guilty by reason of insanity. Under the circumstances of this case where it is clear that the petitioner's only realistic path to exoneration lies in his ability to prove his lack of mental capacity at the time of the alleged crime, an order compelling him to waive his privilege against self-incrimination or lose his right to prove his insanity at the trial is more than costly—it is extortionate.

III.

For the scope of the privilege against self-incrimination in the context of a pretrial psychiatric examination has been considered by Courts of many jurisdictions and various results have been produced. Some jurisdictions which have entertained the problem have arrived at substantially

the same result as the New York Court of Appeals in this proceeding. See *e.g., In re Spencer*, 63 Cal., 2d 400, 46 Cal. Rptr. 753, 406 P. 2d 33 (1965); *State v. Whitlow*, 45 N. J. 3, 210 A. 2d 763 (1965); *State v. Myers*, 220 S. C. 309, 67 S. E. 2d 506 (1951); *United States v. Baird*, 414 F. 2d 700 (2d Cir. 1969); *U. S. v. Weiser*, ____ F. 2d ____ (____ Cir. 19__); *United States v. Albright*, 388 F. 2d 719 (4th Cir. 1968); On the other hand, other Courts have arrived at a contrary conclusion taking the position advanced by the petitioner herein. See *e.g., Hunt v. State*, 248 Ala. 217, 27 So. 2d 186 (1946); *Hall v. State*, 209 Ark. 180, 189 S. W. 2d 917 (1945); *French v. District Court*, 153 Colo. 10, 384 P. 2d 268 (1963); *People v. English*, 31 Ill. 2d 310, 201 N. E. 2d 455 (1964); *State v. Hathaway*, 161 Me. 255, 211 A. 2d 558 (1969); *State v. Olson*, 274 Minn. 225, 143 N. W. 2d 69 (Minn. 1966); *State v. Swinburne*, 324 S. W. 2d 746 (Mo. 1959); *Shepard v. Bowe*, 442 P. 2d 238 (Ore. 1968).

The soundness of the decision of the New York Court of Appeals in this case and that of similar decisions are called into serious question when measured against the comments of Chief Judge Bazelon who wrote for majority in Thornton v. Corcoran, 407 F. 2d 695 (D. C. Cir. 1969) and addressed himself to the problem as follows:

> "The Fourth Circuit, for example, reasoning from the premise that the Government in all the Federal cases bears the burden of proving the sanity of the accused beyond a reasonable doubt once that issue has been properly raised, *Davis v. United States*, 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499 (1895), has concluded that 'if the Government is required to shoulder the entire load, it cannot be denied access to the only reliable means of ascertaining the truth concerning defendant's sanity' *United States v. Albright*, 388 F. 2d 719, 724 (4th Cir. 1958); see also *Alexander v. U. S.*, 380 F. 2d 33, 39 (8th Cir. 1967); *Pope v. U. S.*,

372 F. 2d 710, 720-721 (8th Cir. 1967), vacated on other grounds, 392 U. S. 651, 88 S. Ct. 2145, 20 L. Ed. 2d 1317 (1963). But this argument from necessity, however compelling, no longer justifies interrogation of the defendant without regard for the Fifth Amendment concerning his participation in the acts charged where the Government of course must also 'shoulder the entire load'. *Miranda v. Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). There may be sound reasons to distinguish between the criminal acts and the accompanying mental state of the actor in measuring the scope of the self-incrimination privilege. But the Government must prove both a 'vicious act' and a 'vicious will.' We cannot simply assume the distinction between the two insofar as the privilege against self-incrimination is concerned . . ."

These substantial conflicts among the jurisdictions would appear to justify the grant of certiorari to review the judgment below.

IV.

In the instant case, the trial Court allowed the active participation of defense counsel at the psychiatric examination. The Appellate Division of the Supreme Court, Fourth Judicial Department excluded all non-medical personnel. Finally, the Court of Appeals of the State of New York allowed the presence of counsel at the psychiatric examination whose role would be that of merely an observer.

If this Court were to conclude that the privilege against self-incrimination is not waived by the interposition of a plea of not guilty by reason of insanity, then it seems clear that the right to assert the privilege would be impaired if not destroyed unless the defendant were permitted to have counsel perform an active role while present at the examination.

If this Court should agree with the concept of waiver set forth on the decision of the New York Court of Appeals, it does not follow that it should accept the limitation sought to be imposed upon the petitioner's Sixth Amendment right to counsel. In *United States v. Wade*, 388 U. S. 218, 87 S. Ct. 1926 (1967), this Court recognized the existence of the right to counsel although no Fifth Amendment rights were held to be involved in the proceeding to which they applied.

It is respectfully submitted that the *Wade* case must be read for the proposition that an accused has the right to active counsel at every confrontation with the State. Several of the Federal Courts have come very close to adopting the position that counsel is required at a pretrial psychiatric examination. In *Schantz v. Eyman*, 418 F. 2d 11 (9th Cir. 1969), although the Court did not reach the precise issue presented here, it found that the post-indictment questioning of a murder defendant by a state psychiatrist on the prosecution's instructions, without notice and in the absence of counsel, violated the defendant's right to counsel at a critical stage of the proceeding. In *Thornton v. Corcoran*, *supra*, the Court discussed the precise issue presented here at some length and concluded that the question of the right to counsel is "not frivolous" but then dismissed the action on the basis of a procedural impropriety.

Petitioner therefore contends that the constitutional right to counsel at a psychiatric examination contemplates a more active role than that which is permitted by the New York Court of Appeals in this case. (See Judge Fuld's dissent at pages 31-34 of the Appendix.)

CONCLUSION

For the foregoing reasons the Writ of Certiorari should be granted.

Respectfully submitted,

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PAUL IVAN BIRZON,
of Counsel.

Appendix A

CODE OF CRIMINAL PROCEDURE.

Section 658 Court order for examination as to sanity of Defendant.

If at any time before final judgment it shall appear to the court having jurisdiction of the person of a defendant indicted for a felony or a misdemeanor that there is reasonable ground for believing that such defendant is in such state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or proceedings or of making his defense, or if the defendant makes a plea of insanity to the indictment, instead of proceeding with the trial, the court, upon its own motion, or that of the district attorney or the defendant, may in its discretion order such defendant to be examined to determine the question of his sanity. Added L. 1939, c. 861, Section 2, eff. Sept. 1, 1939.

Appendix B

State of New York,
Court of Appeals,
State Reporter's Office. } ss.:

I, JAMES M. FLAVIN, State Reporter of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of *Matter of Lee* v. *County Ct. of Erie County* decided by the Court of Appeals on the 14th day of January, 1971, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

IN WITNESS WHEREOF, I have hereunto affixed my signature as State Reporter, at the City of Albany, in the State of New York, this 3rd day of March, 1971

JAMES M. FLAVIN,
State Reporter of the State of New York.

Attest:
L. S. RAYMOND J. CANNON,
(SEAL) Clerk of the Court of Appeals.

State of New York,
Court of Appeals.

I, STANLEY H. FULD, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that RAYMOND J. CANNON is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof and that JAMES M. FLAVIN is the official reporter of said court, having custory of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of *Matter of Lee v. County Ct. of Erie County* decided by the said Court of Appeals on the 14th day of January, 1971, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of RAYMOND J. CANNON, as clerk of said court, appended thereto is the true and genuine signature of said RAYMOND J. CANNON, and the signature of JAMES

M. FLAVIN, as State Reporter, appended thereto is the true and genuine signature of said JAMES M. FLAVIN.

IN WITNESS WHEREOF, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall in the City of Albany and State of New York on the 15th day of March in the year one thousand nine hundred and seventy one.

STANLEY H. FULD,
Chief Judge of the Court of Appeals
of the State of New York

In the Matter of RUFUS LEE, Respondent-Appellant,
COUNTY COURT OF ERIE COUNTY et al.,
Appellant-Respondents

Decided January 14, 1971

SCILEPPI, J. We have been called upon to decide questions relating to the effect of a plea of not guilty by reason of insanity on a defendant's constitutional rights.

In 1964, Rufus Lee, petitioner herein, was indicted for the murder of two women which occurred on November 5, 1964, two days after his release from a mental institution. In February, 1965, a psychiatric examination was ordered by a County Court Judge pursuant to section 658 of the Code of Criminal Procedure and Lee, thereafter, on July 30, 1965, pleaded not guilty by reason of insanity. Prior to the trial, the court found that Lee was competent to stand trial.[1] At the trial in December, 1965, the two court-appointed psychiatrists testified on Lee's behalf that, on the basis of the above referred to examination

[1] Though the two psychiatrists who participated in the examination informed the court that it was their opinion that he was incompetent to stand trial, the court considered other evidence and found him competent.

and a latter one shortly before trial, he suffered from a "schizophrenic psychosis, paranoid type" and that as a result of this mental disease or defect, Lee lacked substantial capacity to know or appreciate either the nature or consequences of his conduct or that it was wrong. This testimony was corroborated by a third psychiatrist who had also examined Lee prior to trial. However, these physicians also admitted that it was possible for such a person to act rationally at times. In addition, the People called a psychiatrist who testified that on the basis of an examination of Lee's hospital records, Lee was sane. The jury found the defendant guilty, but on appeal, the Appellate Division in February, 1968, ordered a new trial on the ground that the People had not proven sanity beyond a reasonable doubt and for the further reason that the verdict was against the weight of the evidence (29 A D 2d 837).[2] Lee again pleaded not guilty by reason of insanity and in preparation for the new trial, the District Attorney's motion for a mental examination was granted by the County Court in February, 1969. Defendant, asserting his privilege against self incrimination, refused to submit to the examination and was found in contempt of court. The Appellate Division reversed the contempt order [32 A D 2d 885] and the County Court once again granted the District Attorney's application for an examination to be held on September 19, 1969. This order provided that defense counsel and an assistant district attorney could be present at such examination and further directed that:

"Defendant, or defendant's attorney shall note his objections for the record and such objection shall be passed upon by the Trial Court prior to the trial of this indictment; and it is, further

[2] The reason for the delay in the Appellate Division does not appear.

"ORDERED, that in the event that this defendant shall refuse to answer questions deemed pertinent by the designated psychiatrists, then this Court will entertain a motion by the People of the State of New York to strike defendant's defense of insanity and deny the defendant the right to call psychiatric witnesses in his behalf".

On the advice of counsel, petitioner refused to answer questions concerning his behavior on the day of the crime and those relating to his conduct in October, August and July of 1964. Absent defendant's answers to their questions, the psychiatrists were unable to proffer an opinion as to Lee's capacity to commit the crime[3] and on motion of the District Attorney, the County Court ordered that Lee's plea of not guilty by reason of insanity be stricken; that he be precluded from offering psychiatric evidence on his behalf; and that the matter proceed to trial. Lee thereupon commenced in the Appellate Division, the instant article 78 proceeding in the nature of prohibition seeking an order preventing the trial court from striking his insanity defense and from directing that he proceed to trial without being able to present evidence of his insanity. The Appellate Division vacated the order striking the defense, but directed that Lee submit to another mental examination without the presence of nonmedical personnel and the matter is here on cross appeals from the Appellate Division order.

The threshold question presented is whether an article 78 proceeding in the nature of prohibition is an appropriate vehicle to raise the questions presented herein. Although the use of the writ of prohibition has usually been limited to cases where a court acts without jurisdic-

[3] It appears that in the years since the commission of the crime, Lee's mental condition has improved and that no one suggests that he is now incompetent to stand trial.

tion (see, *e.g., Matter of Hogan* v. *Culkin*, 18 N. Y. 2d 330, 335-336; *People ex rel. Lemon* v. *Supreme Ct.*, 245 N. Y. 24; *People ex rel. Safford* v. *Surrogate's Ct.*, 229 N. Y. 495), it is equally true that "function of the writ * * * [is] not merely to restrain an unwarranted assumption of jurisdiction, but also to restrain an inferior court from exceeding its authorized powers in a proceeding over which it has jurisdication" (*Matter of Hogan* v. *Court of Gen. Sessions*, 296 N. Y. 1, 8; see, also, *People ex rel. Jerome* v. *Court of Gen. Sessions*, 185 N. Y. 504; *Quimbo Appo* v. *People*, 20 N. Y. 531; CPLR 7802, subd. [a]). Additionally, in *Matter of Culver Contr. Corp.* v. *Humphrey* (268 N. Y. 26, 39-40) we said that the writ is an extraordinary remedy which "does not issue where the grievance can be redressed by ordinary proceedings at law or in equity or merely to prevent error which may be readily corrected on appeal (*People ex rel. Mayor* v. *Nichols*, 79 N. Y. 582; *People ex rel. Hummel* v. *Trial Term*, 184 N. Y. 30; *People ex rel. Livingston* v. *Wyatt*, [186 N. Y. 383] *supra*; *People ex rel. Childs* v. *Extraordinary Trial Term*, 228 N. Y. 463.) It is not available ordinarily as a method of premature appeal. Nevertheless, where the lower court is exceeding its jurisdiction and the writ or order furnishes a more effective remedy, it may be availed of although the error might be corrected by appeal." In the instant case, the order striking the plea was clearly nonappealable to the Appellate Division; thus, if prohibition were not available to Lee, he would be forced to submit to trial without the benefit of his plea and if convicted raise his claim of privilege on his appeal from the judgment of conviction.

Although not all constitutional issues are cognizable by way of prohibition (see, *e.g., Matter of Blake and Edstrom*

v. *Hogan,* 25 N Y 2d 747 [holding that the writ does not lie where the claim is a denial of the right to a speedy trial]; *Matter of Kraemer* v. *County Ct.,* 6 N Y 2d 363 [holding that the issue of double jeopardy may be raised in a prohibition proceeding]; *cf. People ex rel. Rohrlich* v. *Follette,* 20 N Y 2d 297), it is our view that the question whether the court properly struck the plea under the circumstances presented herein is of such magnitude as to place this case within the ambit of the writ. Inasmuch as defendant contends that his privilege against self incrimination allowed him to refuse to co-operate at the pretrial mental examination, a serious question as to whether the County Court's order striking the plea was in excess of its jurisdiction is presented and we reach the merits. In so holding, we adhere to the view expressed in prior decisions of this court that the remedy of prohibition is an extraordinary one which is only available in rare cases such as the one at bar.

Petitioner Lee argues that the privilege against self incrimination allows a defendant, who pleads not guilty by reason of insanity, to refuse to answer questions put to him by court-appointed psychiatrist during a pretrial mental examination and that the court improperly struck the plea when defendant relied upon his privilege. Thus, we are called upon to determine whether the privilege obtains at an examination pursuant to section 658 of the Code of Criminal Procedure and if so, whether it is waived when a defendant interposes the defense of insanity.

These are not questions which lend themselves to facile solutions. The People have a right to expect that criminal transgressors will be brought to justice. However, it is our concern with justice which mandates that constitu-

tional rights be safeguarded and that procedures evolve which protect the interests of both society and defendants alike. Consequently, it is our view that the proper approach to the problem presented in the instant appeal is one of balancing these interests as suggested in *United States* v. *Burr* (Fed. Cas. No. 14692a [Vol. 25, p. 38; C.C.D. Va., 1807]) where Chief Justice John MARSHALL wrote (at pp. 39-40) that: "[w]hen two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded."

Traditionally, the privilege against self incrimination has been deemed to protect against so-called testimonial disclosures (8 Wigmore, Evidence, §§ 2263-2265). As Justice HOLMES wrote: "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material" (*Holt* v. *United States*, 218 U. S. 245, 252). Following this rationale, the Supreme Court wrote in *Schmerber* v. *California* (384 U. S. 757, 763-764) that: "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd* v. *United States*, 116 U. S. 616. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photo-

graphing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." (Footnote omitted.)

Thus, if statements made by a defendant during pretrial psychiatric examinations are nothing more than the exhibition of a part of the body, *i.e.*, the mind, the privilege would not obtain (see Danforth, Pretrial Mental Examinations, 19 Rutgers L. Rev. 489, 493). It is our view, however, that these examinations do not readily fit into the *Schmerber* dichotomy. In formulating an opinion on a defendant's mental capacity, the psysicians must draw from both physical and verbal responses. Inasmuch as these responses are relevant on a material element of the crime, *mens rea*, we are unable to analogize them to the mere exhibition of one's body. While strong argument can be advanced that the privilege against self incrimination should not be extended beyond what is generally considered its present scope (see Friendly, The Fifth Amendment Tomorrow: The Case For Constitutional Change, 37 U. of Cincinnati L. Rev. 671), recent decisions of the Supreme Court of the United States have extended the application of the privilege (see, *e.g.*, *Marchetti* v. *United States*, 390 U. S. 39; *Grosso* v. *United States*, 390 U. S. 62; *Garrity* v. *New Jersey*, 385 U. S. 493; *Albertson* v. *SACB*, 382 U. S. 70; *Murphy* v. *Waterfront Comm.*, 378 U. S. 52). Accordingly, it is our view that the privilege does obtain during pretrial psychiatric examinations (see *People* v. *Al-Kanani*, 26 N Y 2d 473; *People* v. *Di Piazza*,

24 N Y 2d 342 [where we have implied that the privilege functioned during psychiatric interviews]). This is not to say that a defendant who proffers an instanity defense may hide behind that defense because of his privilege and thereby make the People's burden of proving sanity insurmountable. In *People* v. *Di Piazza* (*supra*, at p. 352) we said that where a defendant defends by reason of insanity and requests a mental examination, "he may not complain that his privilege against self-incrimination or his right to counsel was violated. (*Cf., e.g., Thornton* v. *Corcoran*, 407 F. 2d 695, 700-701.)" Though it is true that in the instant case it was the District Attorney who requested the examination, it is our view that it is not who requests the examination which controls, but rather the plea of not guilty by reason of insanity, which is the basis of the psychiatrist's competency to testify at the trial. Nor does the mere fact that the examination is requested by the District Attorney necessarily mean that the physician will be a witness for the People. In point of fact, the record herein indicates that the court-appointed psychiatrists testified for the defendant. Additionally, in this case, since Lee had previously voluntarily submitted to examination, he should be barred from claiming the privilege at this time.

As the then Judge CONWAY so accurately observed in *People* v. *Esposito* (287 N. Y. 389, 397): "It must be remembered that the orders for the examination and observation were based upon the defendants' claim that they should escape punishment by reason of their mental condition at the time of the commission of the acts charged or by reason of their condition at the time of arraignment and trial. *Under those circumstances defendants may not both advance their claims and then seek to make the rules for*

the determination of those claims. Since they desired to present their claims that they were not legally responsible for their acts because of mental defect they were subject to the use of methods set up objectively by the medical profession for the proper determination of such claims. Courts, under the circumstances presented here, may not control the methods which have been determined by the medical profession to be proper means for discovering or treating mental diseases." (Emphasis supplied.)

Accordingly, we hold that the privilege is waived when a defendant interposes his insanity defense. In so doing, we note that several jurisdictions have considered the problem, reaching substantially the same result (see, *e.g.*, *In re Spencer*, 63 Cal. 2d 400; *State* v. *Whitlow*, 45 N. J. 3; *State* v. *Myers*, 220 S. C. 309; *United States* v. *Baird*, 414 F. 2d 700; *United States* v. *Weiser*, 428 F. 2d 932; *United States* v. *Albright*, 388 F. 2d 719; *contra*, *Hunt* v. *State*, 248 Ala. 217; *Hall* v. *State*, 209 Ark. 180; *French* v. *District Ct.*, 153 Col. 10; *People* v. *English*, 31 Ill. 2d 301; *State* v. *Hathaway*, 161 Me. 255; *State* v. *Olson*, 274 Minn. 225; *State* v. *Swinburne*, 324 S. W. 2d 746 [Mo.]; *Shepard* v. *Bowe*, 250 Ore. 288). Lest there be any doubt, we are not saying that because of this waiver, the psychiatrist is a competent witness on all matters concerning the commission of the crime. A defendant's waiver of privilege because of his plea of insanity only permits the physician to testify as to the facts which formulate the basis of his medical opinion on the question of sanity. To prevent the psychiatrist from giving the basis of his opinion would vastly limit the value of psychiatric examinations (see *People* v. *Di Piazza*, *supra*, at p. 353). We note that the importance of adequate psychiatric opinion has been emphasized in section 60.55 of the new Criminal Procedure

Law (eff. Sept. 1, 1971) which provides that: "When in connection with a defense of mental disease or defect, a psychiatrist who has examined the defendant testifies at a trial concerning the defendant's mental condition at the time of the conduct charged to constitute a crime, he must be permitted to make a statement as to the nature of the examination, the diagnosis of the mental condition of the defendant and his opinion as to the extent, if any, to which the capacity of the defendant to know or appreciate the nature and consequence of such conduct, or its wrongfulness, was impaired as a result of mental disease or defect at that time. The psychiatrist must be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion, and may be cross examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion." (See Code Crim. Pro., § 398-b.) This is not to say, however, that any admission as to the crime in question can be considered by the jury in their determination of whether the defendant committed the acts which constitute the crime charged. Nor shall the District Attorney be permitted to use the psychiatric examination as a source of evidence which would be relevant on the issue of guilt.

From the foregoing analysis concluding that the privilege was waived by the plea, Lee had no constitutional right to refuse to participate in the examination ordered below.

We now turn to the question whether the County Court properly struck the plea. The court's action was predicated on its view that Lee could not raise an insanity defense and at the same time refuse to submit to an examination. While we agree with that view, we are of the opinion that, inasmuch as a defendant's capacity to commit a crime is not placed in issue by his availability for examination,

but by his plea, striking the plea is not a proper sanction for a refusal to co-operate. Since these examinations are the most effective aid to a determination of the merits of the defense, we hold that where a defendant chooses to deprive the triers of fact of this essential evidentiary source, by refusing to submit to a pretrial mental examination, he cannot at the trial, offer psychiatric evidence on his capacity to commit the crime. If the defendant wishes to call psychiatrists on his behalf, he must first demonstrate to the court in the absence of the jury, that he has, prior to trial, fully co-operated and submitted to a mental examination, where one has been sought by the People. If this obligation is not met by the defendant, the court shall deem the offer of psychiatric testimony inadmissible; and unless the defendant has other proof relevant to his defense, the People's burden of proof shall be satisfied by the presumption of sanity which remains in the case. Since in such a case, no issue of fact as to insanity would be presented for the jury, the court shall be permitted to charge that as a matter of law the defendant is sane. Where, however, the defendant has other proof of his defense of insanity, and the court finds that the defendant did not co-operate at pretrial psychiatric examinations sought by the People, this other nonpsychiatric proof, if otherwise competent, shall be admissible. In such a case the court shall instruct the jury as to the presumption of sanity and that they must consider whether defendant's nonpsychiatric proof has rebutted the presumption. Additionally, the court shall be permitted to instruct the jury that the defendant has failed to co-operate (see *Burgunder* v. *State*, 55 Ariz. 411) and that the failure to co-operate should be considered by them in determining the merits of the defense (see Note, Pretrial Mental Examination and Commitment, 51 Geo. L. J. 143, 152-153).

Inasmuch as a new trial was originally ordered by the Appellate Division, we perceive no reason why the jury at that trial should not be aided by the benefit of a new examination. It has always been axiomatic that generally, where a new trial has been ordered, the parties are restored to the status obtaining before the initial trial. Thus, it was proper for the Appellate Division to order a new examination. Nor is the fact that the new examination will be conducted some six years after the commission of the crime a reason which should militate against the propriety of ordering the examination. This consideration does not bar the admissibility of psychiatric testimony resulting from the examination and its relevance, if any, is merely a factor which may be considered by the jury in determining the weight to be given to such testimony.

It is argued, however, that the Appellate Division erroneously ordered that the examination be conducted without the presence of nonmedical personnel. With this we agree. Although these pretrial examinations usually occur after arraignment or indictment, our guarantee of counsel at this stage (see, *e.g.*, *People* v. *Waterman*, 9 N Y 2d 561; *People* v. *Di Biasi*, 7 N Y 2d 544) has not heretofore obtained at examinations ordered pursuant to section 658 of the Code of Criminal Procedure. In *People* v. *McKie* (25 N Y 2d 19, 24) we analyzed the postarraignment guarantee of counsel writing that "in order to protect the accused's Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to counsel had to attach during the pretrial period after the judicial proceeding had commenced either by indictment or arraignment." However, since we hold herein that the accused's privilege is waived during pretrial examination, there is nothing to protect and no right to counsel attaches under this rule. Nor is our de-

cision in *People* v. *Al-Kanani* (26 N Y 2d 473, *supra*) apposite. In *Al-Kanani*, we dealt with a secret psychiatric examination which was conducted after arraignment and we held that our postarraignment rule barred such examinations conducted without the permission of the court and knowledge of defense counsel. (*People* v. *Al-Kanani*, *supra*, at pp. 473-477.) In the instant case, the examinations involved were neither secret nor without the permission of the court and consequently we are not faced with an abuse which our postarraignment rule was designed to correct. Nevertheless, it is our view, that in examinations conducted after the date of this decision, the defendant has a right of counsel.

In *United States* v. *Wade* (388 U. S. 218), the Supreme Court held that the Sixth Amendment to the Federal Constitution mandates the presence of counsel at critical stages of the prosecution to preserve the right to a fair trial. A "critical stage" was defined as "any stage of the prosecution, formal or informal, in court or out, where" "the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself" (*Wade*, *supra*, at pp. 226-227). Since pretrial psychiatric examinations are a critical stage in the prosecution of one accused of a crime under the *Wade* rationale, the defendant is entitled to have counsel present to make more effective his basic right of cross-examination (see Note, Right to Counsel at the Pretrial Mental Examination, 118 U. Pa. L. Rev. 448; *State* v. *Whitlow*, 45 N. J. 3, *supra*, at pp. 26-28). Inasmuch as defense counsel is given the right to be present it is only fair to allow the District Attorney the same right.

We see no merit to the argument that defense counsel should be permitted to take an active role at the examination, or that he should be allowed to advise his client not to answer questions put to him by an examining psychiatrist or make objections. As in *Wade* situations, the function of counsel is limited to that of an observer. Both the defense attorney and the prosecutor may take notes and save their comments or objections for the trial and cross-examination of the examining psychiatrist. Additionally, a copy of the medical report must be furnished to both sides, and although no stenographic transcript of the examination is required, if one is made it shall be made available to both sides prior to trial.

Accordingly, the order appealed from should be modified by allowing the presence of defense counsel and the District Attorney at the psychiatric examination to be held, but merely as observers.

Chief Judge FULD (dissenting in part). In view of the unusual facts and circumstances of this case, Rufus Lee (hereinafter referred to as the defendant) should not be compelled to submit to the psychiatric examination directed by the Appellate Division.

The homicides for which he was indicted, committed in November of 1964, occurred two days after he had been released from a mental institution, following an extended period of treatment for his condition. Three months later, upon application of the District Attorney, he was mentally examined, pursuant to section 658 of the Code of Criminal Procedure, by two court-designated psychiatrists. Both of them reported that he was "idiotic, imbecilic or insane" to such an extent that "he [could] not understand the nature of the charge" and "would not be able to participate in his defense".

The trial judge, however, disagreed with this conclusion and directed that the defendant be tried. The two court-appointed psychiatrists testified at the trial that the defendant was not legally sane at the time the crimes were committed and did not know or appreciate what he was doing or that it was wrong, and a third psychiatrist testified to the same effect. The only opposing testimony came from a doctor who, basing his opinon solely on a half-hour reading of the defendant's hospital records, had not examined or interviewed him personally.

Notwithstanding this evidence, the jury found the defendant guilty, and he was sentenced to life imprisonment. The Appellate Division, however, reversed the judgment on the ground that "[t]he People failed to prove beyond a reasonable doubt that defendant possessed substantial capacity to know or appreciate his conduct and its consequences". (*People* v. *Lee*, 29 A. D. 2d 837, 838.) Although this should, in my opinion, have led to reversal of the judgment and dismissal of the indictment, the Appellate Division directed a new trial.

It was in preparation for that trial that the District Attorney—in July, 1969, almost five years after the commission of the crimes and despite the fact that the earlier examination had been conducted by court-designated psychiatrists upon the prosecution's own request—applied for a new mental examination. As I have already stated, I do not believe that the People are entitled to such an examination. In the first place, there is no authority, in statute or decision, for the District Attorney's position that, even though the People had already procured one examination under section 658 of the Code, in which the defendant fully co-operated, they might secure another for the purpose of acquiring additional psychiatric testimony to assist them in obtaining a conviction. In the second place, since it was the prosecution which had subjected

Lee to a mental examination by court-designated psychiatrists in 1965 (shortly after the homicides), it seems to me that, to compel him to go through the travail of another extended psychiatric examination more than six years after the crimes had been committed—having in mind his long record of mental illness, the proceedings already held and the Appellate Division's 1968 reversal of his conviction because "[t]he People failed to prove beyond a reasonable doubt" that the defendant was legally sane—would be unduly burdensome and egregiously unfair as a matter of law.

Accordingly, I would grant Lee's petition and hold that he may not be compelled to submit to a further psychiatric examination.

Although I might well conclude at this point, I am impelled to add that, if we had before us the usual case of a defendant who had refused to answer questions upon his initial mental examination, I would subscribe to the principle announced by the court that an accused who pleads insanity as a defense may not insist upon his privilege against self-incrimination. I strongly disagree, however, with the court's further determination that defense counsel must be barred from taking an active role during the interrogation of his client at a psychiatric examination (opn., p. 444). A defendant's Sixth Amendment right to assistance of a lawyer exists separate and apart from his Fifth Amendment privilege against self incrimination and, quite obviously, the fact that one accused of crime may have waived his privilege cannot—as is suggested (opn., p. 443)—destroy or impair his constitutional right to an attorney. I think it self-evident that to restrict a defendant's right to a lawyer upon his pretrial mental examination—at least when he is being questioned for the purpose of determining his mental condition at the time of

the crime—will frequently have the effect of substantially abridging, if not eliminating, every right he may have to the effective assistance of counsel in the preparation of his defense. (See *People* v. *Al-Kanani*, 26 N Y 2d 473, 477; see, also *People v. Donovan*, 13 N Y 2d 148, 151; *People v. Waterman*, 9 N Y 2d 561, 565; *People v. Di Biasi*, 7 N Y 2d 544, 550; Note, 51 Geo. L. J. 143, 161-162; *cf. In re Spencer*, 63 Cal. 2d 400, 409, 410; *Wade* v. *United States*, 388 U. S. 218, 224 *et seq.*; *Thornton* v. *Corcoran*, 407 F. 2d 695, 698 *et seq.*) "In view of the importance of this [pre-trial] examination", it has been said (Note, 51 Geo. L. J., at p. 162), "the dangers inherent in subjecting the defendant to it without giving him the benefit of an attorney's advice are obvious. The * * * often uneducated defendant will seldom understand the far reaching significance of the questions put to him by a trained psychiatrist. Questions calling for seemingly innocuous answers can be aimed at eliciting the most damaging responses. Without the benefit of counsel to advise him, it is quite likely that the * * * accused will unknowingly provide the prosecution with sufficient evidence to secure his conviction by defeating his defense of insanity before the trial has even begun. In such a situation the harm done to the defendant's case is irreparable. *When the sole issue is the defendant's sanity at the time of the crime, the right to the assistance of counsel is thus as important at the time of the defendant's mental examination as it is at the time of the trial itself*". (Emphasis supplied.) I agree that some sacrifice of individual liberty is necessary in this area of the law but I perceive no justification for denying the defendant all opportunity to be represented by counsel during his interrogation at such a critical stage of the proceedings.

I would modify the order appealed from by reversing so much of it as directs a new mental examination.

BREITEL, J. (dissenting in part). I disagree with so much of the opinion for the majority as suggests that defendant is entitled only to limited rights of counsel during a pretrial mental examination, and agree on that issue with Chief Judge FULD. I would, therefore, modify the order of the Appellate Division in that respect. I also disagree with some of the procedures suggested by the majority to be followed upon a trial when the issue of insanity is raised and the defendant has or is believed to have failed to co-operate in a court-directed mental examination.

It is true that defendant by his plea of insanity has waived so much of his privilege against self incrimination as is necessary to inquire into his mental state. But, as the majority seems to suggest, the line between an inquiry limited to his mental condition and one extended to the merits of the charge against the defendant cannot be drawn. Several consequences follow from this. In the first place, it marks as especially critical to defendant his exposure to oral interrogatory examination, and, therefore, emphasizes the critical need for him to be represented by counsel even during a mental examination, clumsy and awkward although that might be. In the second place, while defendant has waived his privilege against self incrimination *pro tanto*, he has not waived his right to counsel, an equally high constitutional right (*People* v. *Donovan*, 13 N Y 2d 148, 151).

Having concluded that a defendant who pleads insanity has waived his privilege against self incrimination *pro tanto*, I would permit the prosecutor to comment and the court to instruct the jury on what defendant did or what he did not do in the course of the mental examination (*cf. Williams v. Florida*, 399 U. S. 78, 81-84; but see *State* v.

Olson, 274 Minn. 225, 232). Thus, I would permit comment, and appropriate instructions on possible alternative evaluations by the court, on the failure to co-operate to be weighed by the jury as a factor in determining whether the issue of insanity was feigned or genuine. I would go no further in providing a *voir dire* procedure, of which there are now too many, and especially not to evaluate whether defendant has or has not co-operated. Nor would I under any circumstances exclude any competent evidence bearing on the issue and therefore, on defendant's criminal responsibility (*cf. French* v. *District Ct.*, 153 Col. 10, 13-14).

The fact, amply demonstrated over the years, is that a failure of a defendant who pleads insanity to refuse to co-operate most often reflects an even greater degree of insanity rather than less. He is not always controllable by his lawyer, and many a psychotic defendant, who may or may not be legally insane, refuses to be represented by a lawyer. In short, non-co-operation may be evidence of insanity just as much as it may be evidence of a feigned issue of insanity. The problem like so many others is just another difficult issue of fact to resolve. But that is the jury's province. For that very reason the jury should have all the relevant information, the evidence proffered by defendant, and the facts which might militate against the weight or reliability of that evidence.

Indeed, I find the allowing, in some circumstances, of defendant's nonmedical evidence on insanity and preclusion of his medical (expert) testimony a paradox that would make the legal process quite irrational. That a possibly insane defendant has triggered this consequence is immaterial. And the defendant is possibly insane, or no part of the issue would be before the trial court.

Because it should be obvious that in some few cases even the most subtle handling would create an impossible task for Trial Judge and jury, a bifurcated trial on the separate issues of legal insanity and the merits should be considered. This has been done in some States by statute or by reason of the inherent control over the trial of issues by courts, even as in civil cases (see, *e.g.*, California Penal Code, § 1026; *People v. Daugherty*, 40 Cal. 2d 876, 893, cert. den. 346 U. S. 827; *State ex rel. La Follette* v. *Raskin*, 34 Wis. 2d 607, 624-627).

For these reasons, I dissent in part and would modify the order of the Appellate Division to allow counsel to be present with power to object and advise at a new mental examination.

Judges BERGAN, JASEN and GIBSON concur with Judge SCILEPPI; Chief Judge FULD dissents in part and votes to modify as stated in an opinion in which Judge BURKE concurs; Judge BREITEL dissents in part and votes to modify as stated in a separate opinion.

Ordered accordingly.

Memorandum-Decision of Appellate Division

14. (Erie Co.)—In the Matter of the Application of Rufus Lee, Petitioner, v. County Court of Erie County, *et al.*, Respondents. Petition unanimously granted to the extent stated in the Memorandum herein and judgment directed in favor of petitioner in accordance therewith, with costs to petitioner. Memorandum: In this Article 78 proceeding in the nature of prohibition petitioner seeks to

vacate an order of Erie County Court which struck from the record his plea of not guilty by reason of insanity, precluded him from offering psychiatric evidence at the trial and restored the first degree murder indictment against him to the court calendar for trial. The order was granted on motion of the District Attorney which disclosed that petitioner had refused to answer questions put to him by two psychiatrists appointed pursuant to a court order to examine him to determine his mental condition at the time of the crime (Code Crim. Pro. § 658). The order provided that petitioner's attorney might attend the examination. It also provided that in the event of petitioner's refusal to answer questions deemed pertinent by the designated psychiatrists the court would entertain a motion to strike the defense of insanity.

In our opinion County Court exceeded its authorized powers in striking petitioner's defense of insanity. Under the circumstances of this case prohibition should be granted because appeal would not provide a satisfactory remedy (*cf.* Schlagenhauf v. Holder, 379 U. S. 104, 110). While the petition should be granted there should be a new full scale mental examination of petitioner uninfluenced by the presence of non-medical persons. (People v. DiPiazza, 24 N. Y. 2d 342, 353.)

The examining psychiatrists reported that Mr. Lee was under the influence of his attorney, he refused to answer questions at the attorney's behest and in view of Mr. Lee's adamant refusal to divulge any information about his behavior at the time of the alleged murder they could not make an assessment of his competency at that time. "The presence of a third party in a legal and non-medical capacity would severely limit the efficacy of the examination." (United States v. Albright, 338 F. 2d 719, 726.) See also

State v. Whitlow, 45 N. J. 3, 27, 28; Rollerson v. United States, 343 F. 2d 269, 274; United States v. Baird, 414 F. 2d 700, 711. The judgment granting the petition is, therefore, made without prejudice to a motion by the People to amend the order of Erie County Court dated September 19, 1969 by striking the fourth and fifth ordering paragraphs thereof and adding a provision that defendant be committed for a reasonable period not to exceed sixty days for observation and examination (see Code Crim. Proc. §§ 658, 660; People v. DiPiazza, *supra*, at 351) and also to provide that any statement made by defendant for the purpose of the examination shall be inadmissible in evidence against him in any criminal action on any issue other than that of his mental condition. (See United States v. Albright, *supra*, at 725; United States v. Baird, *supra*, at 708; proposed New York Criminal Procedure Law, Section 730, Point 20(6)). (Application pursuant to Article 78 C. P. L. R. to reinstate plea of not guilty by reason of insanity.) Present: Del Vecchio, J. P., Marsh, Witmer, Gabrielli, Henry, JJ.

Memorandum of Hon: Ernest L. Colucci, Erie County Court Judge

Colucci, J.

The People have moved the Court for an order striking the defense of insanity interposed by the defendant and prohibiting the offering of psychiatric proof as to the mental condition of the defendant on November 5, 1964, the date of the alleged crime. An indictment for Murder in the First Degree was returned on November 12, 1964 by a Grand Jury of Erie County. The defendant pleaded not

guilty by reason of insanity. Prior to the trial of this indictment the People under the provisions of section 658 of the Code of Criminal Procedure had the defendant examined by two psychiatrists. On July 10, 1969 the People moved again for an examination of the defendant pursuant to section 658 of the Code of Criminal Procedure. On September 9, 1969 such motion was granted which brings us to the present motion made on October 14, 1969 to strike the defense of insanity.

The principal arguments by the People on the pending motion are that the defendant, in refusing to answer pertinent questions put to him by the psychiatrists relative to his mental condition at the time of the alleged crime, does in effect thwart the effort of the People to secure a basis upon which they may be able to sustain the burden of proof placed upon them to establish the sanity of the defendant at the time of the alleged crime and that the defendant should not be permitted after interposing the defense of insanity by either refusing to submit to a medical examination or refusing to answer questions germane to his mental condition be able to stifle the proper prosecution of the charge against him. It is the contention of the defense that to force the defendant to answer questions relating to and pertaining to the facts existent at the time of the alleged crime under the guise of a medical examination is a violation of his constitutional privilege against self-incrimination. No precedent has been cited to the Court for striking the defense of insanity. To force the defendant to trial if his defense of insanity is stricken might be construed as denying him one of his basic constitutional rights and guarantees. The whole question however is precipitated in the first instance by the interposition by the defendant of a plea of not guilty by reason of

insanity which plea immediately places an additional burden upon the People which necessitates an order for medical examination and a proper report made as a result of that examination. It is argued by the defense that if the motion to strike the defense of insanity is granted there is no appeal from this intermediate order. All parties concerned, the People, the defendant and the Court, are all desirous of having this matter resolved. If the motion to strike the defense of insanity is granted it seems inconceivable that an Appellate Court would not review the matter in its entirety, consider the rights of the defendant and the necessary burden of proof on the part of the People.

Certain alternatives are offered to the Court: [redacted] Court to adjudge the defendant guilty of contempt in refusing to answer pertinent questions on the examination of his mental condition; (2) the defense to initiate an Article 78 proceeding to review the entire record before the Court. It is argued neither an Article 78 proceeding nor contempt would properly resolve the basic issues involved on an appeal. It is interesting to note that the defendant has already been found in contempt of Court on a section 658, Code of Criminal Procedure, examination and sentenced to thirty days in the Erie County Jail for such contempt. See attached copy of back of indictment.

The Court has considered very carefully and at length the arguments presented both by the People and the defense and has come to the conclusion that the motion to strike the defense of insanity should be granted. It is inconceivable that a defendant should be permitted to enter a plea of not guilty by reason of insanity then oppose a motion for examination as to his mental condition at the

time of the alleged crime and refuse to answer questions relative to such mental condition after such medical examination is ordered by the Court and by his own course of conduct while seeking to avail himself of all of his rights and privileges to which he is entitled to nonetheless stifle or impede the necessary prosecution of his case by the People.

The Court grants the People's motion to strike the defense of insanity interposed by the defendant and precludes the defendant from offering any evidence on the trial of the action relative to his insanity at the time of the alleged crime. The Court is hopeful that this matter will be reviewed by a Court of higher jurisdiction.

Submit Order.

ERNEST L. COLUCCI,
J.C.C.

Dated: Buffalo, New York, October 27, 1969.